

EPA – Proposed Waters of the US Rule



SOIL AND WATER CONSERVATION COMMISSION
AUGUST 13, 2014



Topics



- Proposed Rule Summary
- Interpretive Rule – NRCS Practices
- NCDA&CS plans

Why Rulemaking?



- Court cases have caused confusion
- Reliance on guidance documents
- More predictability and consistency
- Public process

Proposed Rule Summary



Jurisdictional Waters:

- Traditional Navigable Waters
- Interstate Waters
- Territorial Seas
- Impoundments
- Tributaries
- Adjacent Waters (wetlands)

- Other Waters

Definitions



- **Tributary:**

means a water physically characterized by the presence of a bed and banks and ordinary high water mark as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as the bed and banks and an ordinary high water mark can be identified upstream of the break. **A tributary, including wetlands, can be natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of this section.**

Definitions



Tributary

- Means a water physically characterized by the presence of a bed and banks and ordinary high water mark
- A tributary, including wetlands, can be natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, **and ditches** not excluded in paragraphs (b)(3) or (4) of this section.

Definitions



Jurisdictional Ditches

- Altered natural streams
- Ditches excavated in wetlands
- Ditches with perennial flow
- Ditches that connect two waters



Definitions



Excluded Ditches

- Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow (all 3 criteria).
- Ditches that do not contribute flow, either directly or through another water, to a navigable water, interstate water, territorial seas, or impoundment

Definitions



Adjacent Waters

- Wetlands, ponds, lakes, and similar water bodies that provide similar functions which have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas.
- Shallow groundwater connection can qualify

Definitions



Other Waters

- Evaluated on a case-by-case basis to determine if there is a “significant nexus”
- Could cover a small percentage of isolated wetlands

Agriculture Issues



Traditional agriculture exemptions maintained

- Normal farming, silvicultural, and ranching practices
- Prior converted cropland
- Agricultural stormwater
- Return flows from irrigated agriculture

Rapanos Guidance



Jurisdictional:

- Traditional navigable waters (TNWs)
- Wetlands adjacent to TNWs
- Non-navigable tributaries of TNWs that are relatively permanent where the tributaries typically flow year-round (perennial) or have continuous flow at least seasonally (e.g., typically three months) (intermittent)
- Wetlands that directly abut such tributaries

Rapanos Guidance



Case by case basis:

- Non-navigable tributaries that are not relatively permanent (ephemeral streams)
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary
- Generally the “significant nexus” standard

Rapanos Guidance



Not jurisdictional:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

Public Comment



- Published in FR on April 21
- 90 day comment period – extension granted
- Comments due October 20 (extension from July 21)
- NCDA&CS is reviewing
- Working with other groups

Interpretive Rule



- MOU between EPA, USACE, and USDA
- 56 activities are now considered to be “normal farming” and are exempt from CWA 404 permitting
 - Must be an established farming operation
 - Practices must meet NRCS Standards
 - NRCS does not have to design or approve practices
 - Notification/permission not required – practices automatically exempt if NRCS Standards are met
- List to be revisited annually
- Existing agricultural exemptions still apply

Interpretive Rule



- Does the Interpretive Rule actually restrict “normal farming practices?”
 - Most of the 56 practices were likely already exempt as “normal”
 - Compliance tied to NRCS Standards
 - Conflicts between Forestry BMPs, Extension Guidance, SWCC Practices, private consultants
 - These other practices also protect water quality, but are ineligible for the exemption

Interpretive Rule



- Implementation Questions
 - What if a practice is removed from the list (or revised) after it has been installed?
 - Some standards reference other standards that are not exempt – Fishpond Management (399) references Pond (378)

Interpretive Rule



- Interpretive Rule = Guidance Document
- Can be revised without notice or comment period
 - Practices can be added or removed as Standards are updated
- Compliance determined by EPA and USACE, not NRCS

Interpretive Rule



- NCDA&CS submitted comments June 4
- Normal farming definitions:
 - These practices were already considered to be “normal farming”
 - Could make the use of conservation practices more restrictive
- Excessive reliance on NRCS Standards
 - Landowners consult many sources other than NRCS:
 - Cooperative Extension
 - NC Forest Service
 - Local SWCDs
 - Private consultants

Interpretive Rule



- NCDA&CS submitted comments
- Future changes to standards
 - What if a practice is installed, but then removed from the list?
 - What if a practice is installed, but the standard is revised?
 - Most NRCS practices have an expected lifespan – how long must farmers maintain practices?
- NRCS workload issues
 - Many landowners will want assurance that they will meet NRCS standards, so they will seek NRCS assistance
 - Increase in NRCS workload

Thank You!



Questions?

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